

1 GREGORY P. STONE (State Bar No. 78329)  
*gregory.stone@mto.com*  
2 BRADLEY S. PHILLIPS (State Bar No. 85263)  
*brad.phillips@mto.com*  
3 STEVEN M. PERRY (State Bar No. 106154)  
*steven.perry@mto.com*  
4 BETHANY W. KRISTOVICH (State Bar No. 241891)  
*bethany.kristovich@mto.com*  
5 MUNGER, TOLLES & OLSON LLP  
355 South Grand Avenue, 35th Floor  
6 Los Angeles, California 90071-1560  
Telephone: (213) 683-9100  
7 Facsimile: (213) 687-3702

8 Attorneys for Defendant  
INTEL CORPORATION  
9

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION  
12

13 IN RE HIGH-TECH EMPLOYEE  
14 ANTITRUST LITIGATION

Master Docket No. 11-CV-2509 LHK

15 THIS DOCUMENT RELATES TO:

16 ALL ACTIONS  
17  
18  
19  
20

**NOTICE OF MOTION AND MOTION  
BY INTEL CORPORATION FOR  
SUMMARY JUDGMENT PURSUANT  
TO FED.R.CIV.PRO. 56**

Date: March 20, 2014  
Time: 1:30 p.m.  
Courtroom of the Hon. Lucy Koh  
Courtroom 8, 4th Floor

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. SUMMARY OF ARGUMENT .....	1
III. FACTUAL BACKGROUND .....	3
IV. LEGAL STANDARD .....	5
V. ARGUMENT.....	5
A. There Is No Direct or Circumstantial Evidence That Intel Joined Any Overarching Conspiracy .....	5
B. The Allegedly Anticompetitive Or Unlawful Nature Of The Intel/Google DNCC Agreement Is Irrelevant To The Question Presented Here .....	7
C. Otellini’s Assumed Knowledge Of The Apple/Google DNCC Agreement, And His Assumed Effort To Reach A Similar Intel/Google Agreement, Are Insufficient To Avoid Summary Judgment.....	9
D. Plaintiffs’ Contention That Steve Jobs Was Involved In Several DNCC Agreements Does Not Support Any Inference That Intel Joined Any Overarching Conspiracy .....	10
E. The <i>Beltz</i> Case Does Not Assist The Plaintiffs At The Summary Judgment Stage.....	10
VI. CONCLUSION .....	11

## TABLE OF AUTHORITIES

Page(s)

## Cases

## FEDERAL CASES

<i>AD/SAT, Inc. v. Associated Press, et al.</i> , 181 F.3d 216 (2d Cir. 1999) .....	1, 5, 11
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007) .....	passim
<i>Beltz Travel Serv. Inc. v. Int’l Air Transp. Ass’n</i> , 620 F.2d 1360 (9th Cir. 1980) .....	10, 11
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986) .....	11
<i>Howard Hess Dental Labs. Inc. v. Dentsply Int’l, Inc.</i> , 602 F.3d 237 (3d Cir. 2010) .....	5, 9
<i>In re High-Tech Employee Antitrust Litig.</i> , 856 F.Supp.2d 1103 (N.D.Cal. 2012) .....	10, 11
<i>In re Ins. Brokerage Antitrust Litig.</i> , 618 F.3d 300 (3d Cir. 2010) .....	2, 7, 8
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986) .....	1, 5
<i>Monsanto Co. v. Spray-Rite Serv. Corp.</i> , 465 U.S. 752 (1984) .....	1, 5, 6, 11
<i>White v. R.M. Packer Co.</i> , 635 F.3d 571 (1st Cir. 2011) .....	9
<i>Wilcox v. First Interstate Bank of Oregon, N.A.</i> , 815 F.2d 522 (9th Cir. 1987) .....	passim

## FEDERAL RULES

Rule 12(b)(6) .....	8
Rule 56 .....	1, 11

**NOTICE OF MOTION BY INTEL CORPORATION FOR ENTRY  
OF SUMMARY JUDGMENT PURSUANT TO FED.R.CIV.PRO. 56**

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 20, 2014, at 1:30 p.m., or as soon thereafter as this matter may be heard in Courtroom 8, 4th Floor, of the United States District Court, Northern District of California, located at 280 South 1st Street, San Jose, California, the Honorable Lucy H. Koh presiding, defendant Intel Corporation ("Intel") will and hereby does move this court, pursuant to Federal Rules of Civil Procedure 56, for an order entering summary judgment in Intel's favor with respect to plaintiffs' federal and state antitrust claims against it.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities in support thereof, the Declaration of Steven M. Perry (which attaches Intel's Evidentiary Submission in Support of this motion), the Declaration of Edward A. Snyder, Ph.D., filed separately, the pleadings and files in this action, any Reply Memorandum, and such other arguments and authorities as may be presented at or before the hearing.

DATED: January 9, 2014

MUNGER, TOLLES & OLSON LLP

By: /s/ Gregory P. Stone  
Gregory P. Stone

Attorneys for Defendant  
INTEL CORPORATION

1 **I. INTRODUCTION**

2 After full discovery, the evidence with respect to Intel Corporation (“Intel”)  
 3 demonstrates at most that Intel entered into a single bilateral “Do-Not-Cold-Call” (“DNCC”)  
 4 agreement with Google Inc. (“Google”). Plaintiffs have no direct or circumstantial evidence  
 5 showing that Intel entered into the broader “overarching conspiracy” alleged in the Amended  
 6 Complaint. Moreover, because the Intel/Google DNCC agreement was indisputably in Intel’s  
 7 self-interest irrespective of the conduct of the other defendants, no inference that Intel joined  
 8 any broader conspiracy may be drawn from that agreement. Intel is therefore entitled to  
 9 summary judgment regardless of whether other defendants entered into the overarching  
 10 conspiracy that plaintiffs allege.

11 **II. SUMMARY OF ARGUMENT**

12 An antitrust plaintiff that alleges a defendant joined an unlawful conspiracy must, to  
 13 avoid summary judgment, produce evidence from which a reasonable jury could find that the  
 14 defendant made a “conscious commitment” to join that conspiracy. *Monsanto Co. v. Spray-Rite*  
 15 *Serv. Corp.*, 465 U.S. 752, 764 (1984). In addition, “antitrust law limits the range of  
 16 permissible inferences” that a jury may draw from ambiguous evidence. *Matsushita Elec.*  
 17 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). In particular, antitrust plaintiffs  
 18 who (as here) rely on circumstantial evidence to prove a conspiracy cannot avoid summary  
 19 judgment unless they present admissible evidence that “tend[s] to rule out the possibility” that  
 20 the defendant was “acting independently.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554  
 21 (2007) (“*Twombly*”).<sup>1</sup>

22 Intel is entitled to summary judgment because, after more than 100 depositions and the  
 23 production of hundreds of thousands of documents, plaintiffs cannot satisfy this burden.  
 24 Plaintiffs have no evidence from which a reasonable jury could find that Intel joined the alleged  
 25 “overarching conspiracy” to “fix and suppress the compensation” of every other defendant’s  
 26

---

27 <sup>1</sup> The plaintiffs must, of course, satisfy this burden as to each moving defendant individually. *See,*  
 28 *e.g., AD/SAT, Inc. v. Associated Press, et al.*, 181 F.3d 216, 234 (2d Cir. 1999) (holding that  
 antitrust plaintiffs must show “that each defendant conspired in violation of the antitrust laws”).

1 employees in the class. Amended Complaint, ¶¶ 1, 55. The only action by Intel that plaintiffs  
 2 now contend was in furtherance of the purported overarching conspiracy was Intel's decision to  
 3 enter into a bilateral DNCC agreement with Google. Neither the existence of that agreement  
 4 nor the circumstances surrounding it do anything to establish that Intel joined an overarching  
 5 conspiracy to suppress the compensation of all class members. None of the internal Intel,  
 6 internal Google, or Intel-Google communications that plaintiffs cite in their interrogatory  
 7 responses suggest that the Intel/Google DNCC agreement was part of any broader conspiracy.<sup>2</sup>  
 8 And no inference of a conscious commitment on Intel's part to join any overarching conspiracy  
 9 may be drawn from the Intel/Google DNCC agreement, because it is undisputed that the  
 10 agreement was in Intel's self-interest regardless of whether there were other agreements  
 11 between other defendant-pairs. *See Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d  
 12 522, 528 (9th Cir. 1987) (affirming grant of JNOV where "[t]he actions alleged to constitute a  
 13 conspiracy are precisely those that could be motivated by independent self-interest").

14 This fundamental legal principle – that conduct that is consistent with a defendant's self-  
 15 interest, independent of an alleged conspiracy, cannot support an inference that it joined the  
 16 conspiracy – is fully applicable here regardless of whether the Intel/Google DNCC agreement  
 17 was, as plaintiffs claim, overly broad or even illegal. Put differently, when a defendant's  
 18 conduct, standing alone, was consistent with its self-interest, an allegation that such conduct  
 19 may itself have been anticompetitive or unlawful does not alter the fact that the conduct cannot  
 20 support an inference that the defendant engaged in it as part of a multi-party, overarching  
 21 conspiracy. *Twombly*, 550 U.S. at 550, 564-567 (holding that allegations of parallel  
 22 anticompetitive and unlawful conduct could not support a plausible inference of conspiracy  
 23 where the conduct was consistent with each defendant's independent self-interest); *In re Ins.*  
 24 *Brokerage Antitrust Litig.*, 618 F.3d 300, 348-50 and n.53 (3d Cir. 2010) (holding that the  
 25 existence of an allegedly unlawful kickback agreement between two defendants did not support

---

26  
 27 <sup>2</sup> The evidence cited in this motion is attached to the Declaration of Steven M. Perry and cited as  
 28 "IEX \_\_\_\_." Plaintiffs described the evidence in support of the alleged conspiracy in their May 24,  
 2013 Supplemental Answers to Defendants' Second Set of Interrogatories ("2d Rog. Supp. Resp."),  
 IEX ex. A, and June 7, 2013 Answers to Defendants' Interrogatory 16 ("Resp. Rog 16"), IEX ex. B.

1 an inference that the parties to the agreement had joined an “overarching conspiracy” with other  
2 defendants to engage in or conceal such practices).

3 In sum, because plaintiffs have no evidence that Intel joined the overarching conspiracy  
4 alleged in the complaint, summary judgment is required as to Intel.

### 5 **III. FACTUAL BACKGROUND**

6 1. By 2004, Intel’s Chief Operating Officer (and later CEO) Paul Otellini had joined  
7 Google’s Board of Directors. IEX ex. I (Otellini 16:12-14). Google was still relatively young,  
8 but it was growing fast, and wanted to learn from mature Silicon Valley companies such as  
9 Intel. (*Id.* 196:2-197:7). Google “wanted information from [Intel’s] finance teams and HR  
10 teams, maybe the legal team as well, on just how companies grow,” and Intel “made [its]  
11 experts in those areas available to them.” (*Id.*) As a result, Intel provided advice and  
12 information to Google regarding facilities and site selection, overseas expansion and other  
13 issues that Google was “running into as the company was becoming larger and larger.”  
14 IEX ex. F (Kordestani (Google) 86:9-87:10).<sup>3</sup> The two companies also undertook a continuing  
15 series of technical and business collaborations on projects such as data-center efficiency, search  
16 optimization, software compilers and tools, data-transfer efficiency, Google TV, the Android  
17 operating system, the Chrome operating system, and the Chrome browser. IEX ex. I (Otellini  
18 82:21-87:9; 115:9-20; 182:17-25; 196:2-200:18); IEX ex. E (Eustace (Google) 114:24-115:24).

19 2. In 2005, Google created a Do Not Cold Call list and placed Apple, Genentech  
20 and Intel on it. IEX ex. G (Schmidt (Google) 76:2-77:17). At the time, Mr. Otellini and  
21 Genentech CEO Art Levinson were members of Google’s Board of Directors. (*Id.*). The  
22 discovery process has unearthed no evidence that Otellini or anyone else at Intel asked Google  
23 to add Intel to its DNCC list in early 2005. There is also no evidence that anyone employed by  
24 one of the other defendants asked Google to put Intel on Google’s DNCC list.

25 3. There is testimony by Google witnesses suggesting that some or all of Google’s  
26 directors, including Mr. Otellini, might have been informed at some point in time of Google’s

27 \_\_\_\_\_  
28 <sup>3</sup> Where deposition testimony by fact witnesses not employed by Intel is cited in this motion, the  
witness’s employer is noted.

1 DNCC list. IEX ex. H (Brin (Google) 74:3-75:24; 76:18-77:9); IEX ex. G (Schmidt (Google)  
2 81:1-17; 126:8-11). For purposes of this motion only, Intel assumes that Otellini knew of  
3 Google's DNCC list in 2005.

4 4. Plaintiffs contend that Intel and Google entered into a DNCC agreement in 2005  
5 that covered all Intel and Google employees in the class and was not limited to only those  
6 employees involved in collaborations between the companies. Amended Complaint, ¶ 100.  
7 While Intel disagrees, Intel will assume, for purposes only of summary judgment, that Intel and  
8 Google entered into a DNCC agreement in 2005 that was bilateral and covered all Intel and  
9 Google employees.<sup>4</sup> Resolution of these issues is not necessary in order to conclude there is no  
10 evidentiary basis for a jury to find that Intel joined the "overarching conspiracy" that plaintiffs  
11 allege.

12 5. In 2007, Apple and Intel reached a narrow recruiting agreement relating to their  
13 technical collaboration. IEX ex. K (Conrad 82:4-83:3; 99:8-100:23; 109:22-111:4). After full  
14 discovery, plaintiffs do not claim that any Apple/Intel agreement was part of any overarching  
15 conspiracy. IEX ex. A (2d Rog. Supp. Resp. 4:28-6:25).

16 6. In October 2008, Intel decided not to cold-call employees of Pixar, another close  
17 collaboration partner, after Pixar expressed concerns about possible impacts on the parties'  
18 collaborative efforts. IEX ex. L (Prajapati 79:15-81:21). Plaintiffs do not claim that any  
19 Intel/Pixar agreement was part of any overarching conspiracy. IEX ex. A (2d Rog. Supp. Resp.  
20 4:28-6:25).

---

21  
22 <sup>4</sup> The evidence suggests strongly that the principal if not only purpose of the Intel/Google DNCC  
23 agreement was to facilitate the many close collaborations between the two companies. In spring  
24 2006, for example, Google solicited two Intel software engineers working on an Intel/Google  
25 collaboration involving software compilers. IEX ex. I (Otellini 75:2-18). Otellini asked Google  
26 CEO Eric Schmidt "to refrain from soliciting employees that Intel had assigned to work at Google  
27 on joint collaborative projects," and Schmidt said that "[i]t was a fair request." (*Id.* 62:11-21).  
28 Otellini later asked Schmidt to "[l]ive up to what he said" after Google actively recruited several  
Intel employees working on collaborations. (*Id.* 73:13-74:22, 115:9-20). In one such instance, Intel  
sent its site-selection specialist to help Google with a "large physical expansion" in China, and  
Google "liked that person so much, they recruited him." (*Id.* 73:23-74:22). Otellini complained to  
Schmidt because Google's action threatened to "disrupt ... the joint efforts. What would be my  
incentive to help Google if when I send people over there they recruit the best people." (*Id.* 74:19-  
22, 136:5-137:23).



1 **IV. LEGAL STANDARD**

2 A plaintiff alleging an antitrust conspiracy must have “direct or circumstantial evidence  
3 that reasonably tends to prove that [each defendant] had a conscious commitment to a common  
4 scheme designed to achieve an unlawful objective.” *Monsanto*, 465 U.S. at 768 (quotation  
5 omitted). Where, as here, plaintiffs rely on circumstantial evidence to oppose summary  
6 judgment, they “must present evidence that tends to exclude the possibility that the alleged  
7 conspirators acted independently,” *Matsushita*, 475 U.S. at 588, “from which an inference of  
8 conspiracy is more probable than an inference of independent action.” *Wilcox*, 815 F.2d at 525.

9 Having alleged an overarching conspiracy to “fix and suppress the compensation” of all  
10 of the defendants’ employees, Amended Complaint, ¶¶ 1, 55, plaintiff must show that *each*  
11 defendant, considered individually, joined that conspiracy. *AD/SAT, Inc.*, 181 F.3d at 234. *See*  
12 *also Howard Hess Dental Labs. Inc. v. Dentsply Int’l, Inc.*, 602 F.3d 237, 256 (3d Cir. 2010)  
13 (affirming dismissal of plaintiffs’ claim of “an overarching conspiracy between and among” a  
14 manufacturer and its dealers).

15 **V. ARGUMENT**

16 **A. There Is No Direct or Circumstantial Evidence That Intel Joined Any**  
17 **Overarching Conspiracy**

18 Plaintiffs have no direct or circumstantial evidence that Intel joined any overarching  
19 conspiracy to suppress compensation of all defendants’ employees. There is, for example, no  
20 evidence that the Intel/Google DNCC agreement was conditioned on the existence of any other  
21 defendant’s agreements, and none of the Intel and Google communications that plaintiffs cite in  
22 their June 2013 interrogatory responses refer to Intel’s participation in the formation or  
23 operation of any non-Intel DNCC arrangement. Moreover, plaintiffs do *not* contend that as part  
24 of the overarching conspiracy, Intel reached any unlawful DNCC agreements with the other  
25 five defendants: Apple, Pixar, LucasFilm, Adobe and Intuit. IEX ex. A (2d Rog. Supp.  
26 Resp. 4:28-6:25). Finally, none of the Apple, Pixar, LucasFilm, Adobe or Intuit witnesses who  
27 were deposed expressed familiarity with the Intel/Google DNCC agreement or stated that their  
28 company’s DNCC agreements with other defendants were conditioned on an Intel/Google

1 agreement. *See, e.g.*, IEX ex. M (Chizen (Adobe) 280:3-5); IEX ex. N (Cook (Intuit) 112:23-  
 2 113:1). As a consequence, no reasonable jury could find that Intel made a “conscious  
 3 commitment” to join the overarching conspiracy, and summary judgment is required as to Intel.  
 4 *Monsanto*, 465 U.S. at 764.

5 Moreover, plaintiffs cannot rely on Intel’s decision to enter into a bilateral DNCC  
 6 agreement with Google as evidence that Intel joined in the overarching conspiracy, because it is  
 7 undisputed that the Intel/Google agreement, standing alone, was in Intel’s self-interest,  
 8 regardless of the existence of DNCC agreements involving any other defendant-pairs. Experts  
 9 retained by *both* sides have testified that because the Intel/Google DNCC agreement made it  
 10 less likely that Intel would lose valued employees, the agreement was in Intel’s self-interest.  
 11 IEX ex. C (Snyder Decl. ¶ 8); IEX ex. D (Marx 115:19-116:3; 116:15-117:7).<sup>5</sup> It is also  
 12 undisputed that at a high-tech company such as Intel, the technical expertise and skills of its  
 13 employees are the company’s “most valuable assets,” IEX ex. D (Marx 121:19-123:6), and that  
 14 losing those employees can disrupt productivity and team efforts aimed at technical innovation.  
 15 IEX ex. J (James 65:1-69:6; 128:12-22). In addition, as plaintiffs’ expert has acknowledged,  
 16 the loss of highly skilled technical employees to another firm heightens the risk of harm were  
 17 those employees to disclose confidential proprietary information to their new employer.  
 18 IEX ex. D (Marx 123:2-124:25).

19 The Intel/Google DNCC agreement was also in Intel’s self-interest, regardless of its  
 20 breadth, because cold-calling can disrupt a collaborative relationship between companies by  
 21 significantly undermining trust, creating ill will, and interfering with the collaborative process.  
 22 IEX ex. D (Marx 85:20-25; 86:20-94:16); IEX ex. C (Snyder Decl. ¶ 8). It is thus clear that  
 23 even if the Intel/Google agreement was, as plaintiffs contend, broader than necessary to foster  
 24

---

25 <sup>5</sup> Matthew Marx is an assistant professor of Technological Innovation, Entrepreneurship, and  
 26 Strategic Management at M.I.T.’s Sloan School of Management. Prof. Marx was retained by the  
 27 plaintiffs. Edward Snyder is Dean of the Yale School of Management and the Beinecke Professor  
 28 of Economics and Management at Yale. Dr. Snyder was retained by Intel. Both experts submitted  
 reports and were deposed. After his deposition, Prof. Marx submitted a reply report that did not  
 address the issues raised in the deposition testimony cited in this motion.

1 the collaborations, it would still have served that purpose. (*Ibid.*) Thus, whether broad or  
 2 narrow, a DNCC agreement with Google that inhibited “poaching” of employees involved in  
 3 collaborations – as plaintiffs claim happened here – was indisputably in Intel’s self-interest,  
 4 regardless of the existence of any other such agreements between defendant-pairs. (*Ibid.*) *See*  
 5 *also* IEX ex. D (Marx 115:19-119:11).<sup>6</sup>

6 It is well settled that where a defendant’s business practices are, standing alone,  
 7 consistent with its self-interest, those practices cannot support an inference of conspiratorial  
 8 conduct. *Twombly*, 550 U.S. at 554; *Wilcox*, 815 F.2d at 528. For that reason, and because  
 9 plaintiffs have adduced no other direct or circumstantial evidence of Intel’s “conscious  
 10 commitment” to join an overarching conspiracy, summary judgment as to Intel is required.

11 **B. The Allegedly Anticompetitive Or Unlawful Nature Of The Intel/Google**  
 12 **DNCC Agreement Is Irrelevant To The Question Presented Here**

13 Plaintiffs have asserted that the Intel/Google DNCC agreement and the other alleged  
 14 bilateral DNCC agreements between defendant pairs were “naked restraints of trade” that “were  
 15 without legitimate procompetitive justification.” IEX ex. B (Resp. Rog. 16 at 5:18-20). While  
 16 Intel disagrees, this dispute is irrelevant to the issue addressed in this motion – whether  
 17 plaintiffs can proffer sufficient evidence that Intel consciously joined an “overarching  
 18 conspiracy” among all defendants – because the alleged anticompetitive or illegal nature of a  
 19 defendant’s conduct is not relevant to the question whether the defendant engaged in that  
 20 conduct collusively, rather than independently.

21 Both the Supreme Court’s decision in *Twombly* and the Third Circuit’s decision in *In re*  
 22 *Ins. Brokerage Antitrust Litig.* are directly on point. In *Twombly*, the plaintiffs alleged that  
 23 Incumbent Local Exchange Carriers (ILECs) engaged in parallel anticompetitive and unlawful  
 24 conduct to inhibit the growth of competitive local exchange carriers (CLECs), including making  
 25 unfair agreements with CLECs, providing them inferior connections, overcharging, and billing

26 \_\_\_\_\_  
 27 <sup>6</sup> The DNCC agreement was in Intel’s self-interest even if – or especially if – one accepts  
 28 plaintiffs’ theory of harm, that a reduction in cold-calling to a company’s employees will suppress  
 compensation company-wide. Under that theory, Intel, acting independently of the other  
 defendant-pairs, would have had an incentive to reach a DNCC agreement with Google.

1 in ways designed to sabotage the CLECs' relations with customers. 550 U.S. at 550. The  
 2 Supreme Court held, at the Rule 12(b)(6) stage, that these allegations were not sufficient to  
 3 create even "a plausible suggestion of conspiracy," because "even if the ILECs flouted the 1996  
 4 Act in all the ways the plaintiffs allege ..., there is no reason to infer that the companies had  
 5 agreed among themselves to do what was only natural anyway." *Id.* at 566.

6 In *In re Insurance Brokerage Antitrust Litig.*, purchasers of insurance brought antitrust  
 7 claims against insurers and insurance brokers who had purportedly engaged in a "global  
 8 conspiracy" to inflate the price of insurance and to conceal their conduct. 618 F.3d at 308, 313-  
 9 14. The plaintiffs alleged that each of the insurers had entered into an unlawful bilateral  
 10 agreement with a broker to pay kickbacks to the broker in the form of contingent commissions;  
 11 they also alleged that the insurers had agreed not to compete with one another and not to  
 12 disclose to insurance purchasers the existence of the other insurers' unlawful commission  
 13 agreements. *Id.*<sup>7</sup>

14 The Third Circuit squarely held that, regardless of whether each defendant-insurer's  
 15 bilateral "exclusivity-for-kickbacks" commission arrangement with a broker was a "pernicious  
 16 industry practice" or "even lawful," the existence of those agreements was insufficient to  
 17 support inference of an overarching conspiracy among the insurers and brokers to engage in or  
 18 conceal those practices, because each of the bilateral agreements was in the self-interest of the  
 19 insurer regardless of the other insurers' conduct. *Id.* at 334-35 and n.31, 348-50 and n.53. Any  
 20 other rule would mean that whenever a plaintiff alleged that a "pernicious industry practice"  
 21 was common at multiple industry participants, the plaintiff could automatically get to trial on a  
 22 claim based on a "conspiracy among all industry participants" even in the absence of evidence  
 23 showing a conscious commitment to such a conspiracy by any particular defendant. That is not  
 24 the law. *Id.* at 350. *See also Wilcox*, 815 F.2d at 527 (holding that "conscious parallel conduct"  
 25 cannot support an inference of conspiracy unless "it is also shown that each conspirator acted  
 26 against its own self-interest by engaging in the parallel behavior").

27 \_\_\_\_\_  
 28 <sup>7</sup> Plaintiffs here similarly assert that the defendants "agreed to conceal the existence, nature and  
 scope of their scheme. . . ." IEX ex. A (2d. Rog. Supp. Resp. 4:23-24).

1 In sum, because the Intel/Google DNCC agreement was in Intel's self-interest regardless  
 2 of the existence of other such agreements, that agreement could not – even if it were itself  
 3 allegedly illegal or anticompetitive – support an inference that Intel entered into it as part of an  
 4 “overarching conspiracy” with the other defendants. *Id.* Summary judgment is therefore  
 5 required as to Intel.<sup>8</sup>

6 **C. Otellini's Assumed Knowledge Of The Apple/Google DNCC Agreement,**  
 7 **And His Assumed Effort To Reach A Similar Intel/Google Agreement,**  
 8 **Are Insufficient To Avoid Summary Judgment**

9 Plaintiffs claim that Intel CEO Paul Otellini learned in early 2005 that Apple and Google  
 10 had a do-not-cold-call agreement and then decided to seek a similar agreement with Google.  
 11 Supp. Class Certification Motion (Dkt. 418) at 9. There is no evidence that Otellini asked  
 12 anyone at Google in early 2005 to add Intel to Google's DNCC list. Even assuming that  
 13 plaintiffs' claim were true, however, plaintiffs would have shown only that Intel decided, after  
 14 learning of the Google/Apple agreement, to reach a separate but similar agreement with Google.  
 15 As noted above, it is settled that evidence of knowingly parallel conduct by alleged conspirators  
 16 does not assist antitrust plaintiffs in meeting their burden at the summary judgment stage.  
 17 *Wilcox*, 815 F.2d at 525. *See also Twombly*, 550 U.S. at 556-7 (explaining that “[w]ithout  
 18 more, parallel conduct does not suggest conspiracy”); *White v. R.M. Packer Co.*, 635 F.3d 571,  
 19 580 (1st Cir. 2011) (affirming summary judgment in antitrust case and noting that “[m]ere  
 20 parallelism, whether stipulated or proven, does not even create a prima facie conspiracy case”).<sup>9</sup>

21  
 22 <sup>8</sup> Plaintiffs may not avoid summary judgment by re-styling their claims as based solely on the  
 23 Intel/Google DNCC agreement. As plaintiffs previously told the Court, their claims are based on a  
 24 single overarching conspiracy. IEX ex. O (8/8/13 Hr'g Tr. 21:11-14) (statement by Mr. Glackin  
 25 that “we’re alleging a single violation of the Sherman Act, a single conspiracy, agreement,  
 understanding in restraint of trade”). As a result, “the Plaintiffs are bound by the four corners of  
 their amended complaint, which clearly seeks to allege one conspiracy to which [Intel] and all of  
 the [Defendants], as a collective, were parties.” *Howard Hess Dental Labs*, 602 F.3d at 257.

26 <sup>9</sup> This principle applies with particular force where, as here, the challenged conduct was in the  
 27 moving defendant's self-interest regardless of the conduct of its competitors (here, regardless of  
 28 the existence or non-existence of other DNCC agreements involving other defendants). *See*  
*Wilcox*, 815 F.2d at 528 (affirming JNOV where “[t]he actions alleged to constitute a conspiracy  
 are precisely those that could be motivated by independent self-interest”).

1           **D. Plaintiffs’ Contention That Steve Jobs Was Involved In Several DNCC**  
 2           **Agreements Does Not Support Any Inference That Intel Joined Any**  
 3           **Overarching Conspiracy**

4           Plaintiffs have previously suggested that Steve Jobs, who allegedly played a role in  
 5 several bilateral DNCC agreements, was the “ringmaster” of the overarching conspiracy. Supp.  
 6 Class Certification Motion (Dkt. 418) at 7-9. That suggestion (if it were ever proven) would  
 7 not support plaintiffs’ claims against Intel. Plaintiffs have no evidence that Jobs or others at  
 8 Apple asked Google to put Intel on the Google DNCC list. There is also no evidence that  
 9 anyone at Intel ever discussed recruiting restrictions with Jobs. IEX ex. I (Otellini 82:10-20;  
 10 213:3-6); IEX ex. K (Conrad 197:6-15). And there is no evidence that the Intel/Google DNCC  
 11 agreement had any effect on Google’s dealings with Apple (or any other defendant).

12           Plaintiffs previously suggested that because Genentech CEO Arthur Levinson was on  
 13 both the Apple and Google boards in 2005, his overlapping board membership could have  
 14 “provided an opportunity for Mr. Jobs to expand the conspiracy” to include Intel. *In re High-*  
 15 *Tech Employee Antitrust Litig.*, 856 F.Supp.2d 1103, 1119 (N.D.Cal. 2012) (“*In re HTEAL*”).  
 16 The evidentiary record offers no support for this “conduit” theory. Plaintiffs chose not to  
 17 depose Mr. Levinson or anyone else at Genentech; none of the 100+ witnesses who were  
 18 deposed provided any support for this theory; and plaintiffs’ recent interrogatory responses  
 19 simply ignore it. IEX exs. A-B.

20           **E. The Beltz Case Does Not Assist The Plaintiffs At**  
 21           **The Summary Judgment Stage**

22           This Court noted in denying the defendants’ motions to dismiss that the Ninth Circuit  
 23 held in *Beltz Travel Serv. Inc. v. Int’l Air Transp. Ass’n*, 620 F.2d 1360, 1367 (9th Cir. 1980)  
 24 that “[p]articipation by each conspirator in every detail in the execution of the conspiracy is  
 25 unnecessary to establish liability. . . .” *In re HTEAL*, 856 F.Supp.2d at 1118. Plaintiffs cannot  
 26 rely on that principle to defeat summary judgment as to Intel. *Beltz* was decided in 1980, when  
 27 the governing law required *movants* for summary judgment to prove “the *absence* of their  
 28 agreement to participate” in an alleged conspiracy. *Beltz*, 620 F.2d at 1365 (emphasis added).  
 Adhering to these precedents, the *Beltz* court held that because the defendants had failed to



1 establish they were *not* members of the alleged “overall conspiracy,” the “allegations of the  
 2 complaint” were sufficient to defeat summary judgment. *Id.* at 1365-66. Today, the burden is  
 3 on the party opposing summary judgment to offer specific evidence that is “sufficient to  
 4 establish the existence of an element essential to that party’s case.” *Celotex Corp. v. Catrett*,  
 5 477 U.S. 317, 322 (1986). This means that unlike the *Beltz* plaintiffs in 1980, plaintiffs here  
 6 must come forward with specific evidence showing that Intel, in particular, made a “conscious  
 7 commitment” to join the overarching conspiracy, *Monsanto Co.*, 465 U.S. at 764, as well as  
 8 evidence that “tends to exclude the possibility that [Intel] acted independently” when it entered  
 9 into the single DNCC agreement with Google. *Wilcox*, 815 F.2d at 525. After extensive  
 10 discovery, plaintiffs have no such evidence.

# 11 **VI. CONCLUSION**

12 At the motion to dismiss stage, plaintiffs were required only to allege “enough fact[s] to  
 13 raise a reasonable expectation that discovery will reveal evidence of” the alleged conspiracy. *In*  
 14 *re HTEAL*, 856 F.Supp.2d at 1115, *quoting Twombly*, 550 U.S. at 556. *See also id.* at 1120  
 15 (denying motion to dismiss but noting that “[w]hether Plaintiffs can adduce sufficient evidence  
 16 in discovery to prove an overarching conspiracy is a question that is not before the Court  
 17 today.”). Now that discovery has concluded, Rule 56 and the relevant case law impose a higher  
 18 burden on the plaintiffs and require that plaintiffs meet that burden as to each defendant.  
 19 *AD/SAT, Inc.*, 181 F.3d at 234. Because the plaintiffs cannot do so as to Intel, summary  
 20 judgment must be entered in Intel’s favor on plaintiffs’ federal and state<sup>10</sup> antitrust claims.

21 DATED: January 9, 2014

MUNGER, TOLLES & OLSON LLP

22  
 23 By: /s/ Gregory P. Stone  
 Gregory P. Stone

24 Attorneys for Defendant  
 25 INTEL CORPORATION

26 22516295.1

27 \_\_\_\_\_  
 28 <sup>10</sup> The court’s dismissal of the Sherman Act claim will dispose of plaintiffs’ claims under the  
 Cartwright Act as well. *In re HTEAL*, 856 F.Supp.2d at 1114.